Supreme Court, U.S.
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In The
# Supreme Court of The United States
October Term 1998

STEVEN GOLD, *et al.*,
*Petitioners,*

v.

GEORGE HARRISON, *et al.*,
*Respondents.*

Petition For A Writ Of Certiorari
To The Supreme Court of Hawai'i

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the First Amendment automatically protect speech from a defamation suit merely because the speech is claimed to be classified or categorized as "rhetorical hyperbole," without regard to the meaning of the speech, or alternatively, is there a constitutional privilege under the First Amendment to use "rhetorical hyperbole" regardless of whether the meaning is defamatory?

2. Where an attorney relies on decisions of this Court in bringing suit for defamation for speech that is later described by the lower courts as "rhetorical hyperbole," does the Due Process Clause require an evidentiary hearing before the imposition of sanctions against the attorney, totaling more than $45,000, for filing and then pursuing on appeal a "frivolous" suit?

3. Where parties which have never requested sanctions against Plaintiffs' counsel throughout the course of the case, including on appeal, request attorney fees and expenses after the state supreme court awards sanctions in favor of a separate party on separate issues, does the Due Process Clause require an evidentiary hearing and/or an opportunity to be heard before the new sanctions are imposed?

4. Does the imposition of sanctions on an attorney for asserting in a defamation suit that language which the state courts categorized as rhetorical hyperbole was both defamatory and actionable, have a chilling effect on the exercise of First Amendment rights of the attorney acting on behalf of his clients?

## LIST OF PARTIES

### Petitioners

Steven Philip Gold
Scott Howard Whitney
William H. Pickett

### Respondents

George Harrison
Gannett-Pacific Corporation,
d/b/a *The Honolulu Advertiser*
Edward Tanji

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## OPINIONS BELOW

The opinion of the Supreme Court of Hawai'i is reported at 88 Hawai'i 94, 962 P.2d 353. [Appendix at 3.] The Amended (Final) Judgment of the Supreme Court of Hawai'i appears at Appendix 1. The opinions of the trial court on which this appeal is based appear at Appendix 39 and Appendix 43. The Order granting attorney fees to the media defendants appears at Appendix 46.

## JURISDICTION

The judgment of the Supreme Court of Hawai'i was originally entered on July 8, 1998. Following a series of post-opinion motions and amended judgments, a final judgment was entered on October 22, 1998. This petition is filed within ninety days of that date. This Court has jurisdiction to review the judgment on a petition for a writ of certiorari pursuant to 28 U.S.C. §1257.

## STATUTES INVOLVED

None.

## STATEMENT OF THE CASE

The parties to this case are the two original Plaintiffs, Steven Philip Gold and Scott Howard Whitney, and three Defendants: George Harrison, Gannett Pacific Corporation d/b/a *The Honolulu Advertiser*, and Edwin Tanji. In view of the trial court's award of monetary sanctions against William H. Pickett, of the firm of William H. Pickett, P.C., in his capacity as lead counsel for Plaintiffs, and in favor of Mr. Harrison, Mr. Pickett is necessarily a party to, or participant in, this application for a Writ of Certiorari.

Mr. Gold and Mr. Whitney, among others, sued Mr. Harrison to enforce a recorded easement across Mr. Harrison's property, to which Mr. Harrison had denied access to Mr. Gold, Mr. Whitney and others. After the trial court sustained the plaintiffs' motion for summary judgment on the existence of an easement, Mr. Harrison was reported in *The Honolulu Advertiser*, by reporter Edwin Tanji, to have made the following statement:

> Have you ever been raped? I'm being raped by all *these* people. My privacy is being violated. The whole issue is my privacy.

The entire article in which the statement was made appears in the Lodging. [Lodging at 22-23.]

On August 11, 1993, Plaintiffs filed suit in the United States District Court for the District of Hawai'i against Mr. Harrison only. Mr. Pickett was lead counsel in that case, and the allegations in the federal suit were essentially the same as those in the instant case. On October 5, 1993, Mr. Pickett received a fax from local Hawai'i counsel informing him that, prompted by the attorney for Mr. Harrison, an interview with other reporters present at the time of Mr. Harrison's statements to the press suggested that Mr. Harrison's remarks could have been interpreted as being directed at the press or media, rather than at the landowners (including Mr. Gold and Mr. Whitney) who had just won their easement case against Mr. Harrison. [Lodging at 24-28.] On October 6, 1993, the suit against Mr. Harrison was voluntarily dismissed without prejudice. The original complaint in the present case was

filed on July 19, 1995. A First Amended Complaint was filed on July 21, 1995. [Lodging 1-21.]

Defendants Gannett Pacific Corporation and Edwin Tanji moved to dismiss the claims against them for defamation and false light invasion of privacy (the latter being a case of first impression in the state) on August 11, 1995, and filed a memorandum in support, essentially arguing that Mr. Harrison's speech was rhetorical hyperbole and therefore protected by the First Amendment to the Constitution of the United States, that there was no basis for suing either the newspaper or the reporter (Mr. Tanji) who quoted Mr. Harrison's comments in an article published in *The Honolulu Advertiser*. The newspaper article at issue in this case appears in the Lodging at 22-23.

Plaintiffs filed their memorandum in opposition to the media Defendants' motion to dismiss and the newspaper and Mr. Tanji filed a reply. On October 16, 1995, summary judgment was granted in favor of the media Defendants. [Appendix at 43-45.] As of that date, Mr. Harrison had not yet been served.

Following service on Mr. Harrison in May of 1996 (about the validity of which there was a dispute in the state courts), Mr. Harrison filed his motion to dismiss. Besides arguing that any statement by Mr. Harrison was protected by the First Amendment, Mr. Harrison also sought sanctions against Plaintiffs' lead counsel, William H. Pickett. On August 7, 1996, Plaintiffs filed their memorandum in opposition to Mr. Harrison's motion to dismiss. Mr. Harrison filed a reply memorandum on

September 9, 1996. On November 14, 1996, the trial court entered an order granting summary judgment in favor of Mr. Harrison and awarding monetary sanctions in favor of Mr. Harrison and against Mr. Pickett. Mr. Pickett sought an evidentiary hearing on the issue of the sanctions. The motion was never formally ruled upon, but implicitly was denied.

Plaintiffs filed their original notice of appeal on December 12, 1996, together with a motion to stay. The case was ultimately docketed as No. 20325 in the Supreme Court of Hawai'i. On January 7, 1997, the trial court granted the motion to stay, and Mr. Pickett deposited $17,000 with the trial court as a cash supersedeas bond. A final judgment was also entered on January 7, 1997. On January 21, 1997, Plaintiffs filed their second notice of appeal. The second appeal was docketed as No. 20468 in the Supreme Court of Hawai'i, and on motion of Plaintiffs, the cases were consolidated by order of the Supreme Court of Hawai'i, under Case No. 20468.

On July 8, 1998, the Supreme Court of Hawai'i handed down its opinion affirming the trial court, and awarding sanctions in favor of Mr. Harrison and sanctioning Mr. Pickett for pursuing the appeal, but without specifying the amount of the award. [Appendix 38.] Mr. Harrison filed several motions relating to the award of sanctions, and ultimately the Supreme Court of Hawai'i awarded Mr. Harrison $26,110.50 in attorney fees and expenses, which came to $26,689.64 with interest.

The two media defendants also filed a motion

seeking sanctions for a frivolous appeal, although they had never requested sanctions at any time in the proceeding, and although the apparent basis for the motion was that *Mr. Harrison* had been awarded attorney fees. Mr. Pickett pointed out to the Supreme Court of Hawai'i that it was a violation of his due process rights to deny him an opportunity to defend himself on the merits of whether the filing of the claims against the media defendants, and/or pursuing the appeal, were supportable under Haw. R. Civ. P. 11. Mr. Pickett supplied the Court with copies of transcripts of his consultation, prior to filing the state suit, with Professor Jeffrey Thomas of the University of Missouri-Kansas City School of Law, on the issue of whether there was a reasonable basis under the law for pursuing a suit against either or both Mr. Harrison and the media defendants. [A copy of the transcript of each of the telephone consultations of February 6, 1995, March 6, 1995, and May 17, 1995, appears in the Lodging at 29-50, 51-66, and 67-77, respectively.] . The Supreme Court of Hawai'i awarded the media defendants $3,386.25 in attorney fees [Appendix at 46.] A final judgment of the Supreme Court of Hawai'i was handed down on October 22, 1998. [Appendix at 1.] This Petition for a Writ of Certiorari is filed within ninety days of the entry of final judgment in the state case, and this Court has jurisdiction under 28 U.S.C. §1257.

## ARGUMENT

This case presents a significant question of First Amendment jurisprudence which this Court should resolve:

whether the *meaning* of a statement made by a public figure about private citizens should be considered in determining whether the public figure is subject to suit for defamation, or whether there is a *per se* constitutional privilege to use "rhetorical hyperbole" regardless of whether its meaning is defamatory or not.

One of the difficulties with this case, and with the grant of summary judgment by the trial court, and the affirming by the Supreme Court of Hawai'i on appeal, is that a question remains about to whom Mr. Harrison was referring when he made his remarks about being "raped."

Mr. Harrison was quoted in *The Honolulu Advertiser*, in an article by Mr. Tanji, as making certain statements. [Lodging at 22-23.] When the media Defendants (Mr. Tanji and Gannett Pacific Corporation) moved for summary judgment, an argument was made that the statements by Mr. Harrison referred to the media. Yet an examination of the document itself clearly shows that, *as quoted* in *The Honolulu Advertiser* article, Mr. Harrison was referring to the adjacent landowners-easement owners who had sued him, a group which unquestionably includes Mr. Gold and Mr. Whitney. At that point in time the only thing known about what Mr. Harrison actually said, and the target of his remarks, was the version Mr. Tanji supplied in the newspaper article. There was a claim by Mr. Harrison's attorney, initially in the federal suit, that the article was incorrect, and either the Mr. Tanji had misquoted Mr. Harrison, or changed the context. There were clearly highly significant material facts at issue, which should have

precluded the granting of either motion for summary judgment.

While no one in the state court proceedings disputed the accuracy of the language attributed in the newspaper article to Mr. Harrison, there was a dispute over the target of those remarks. Either Mr. Harrison made the remarks, and directed them at Mr. Gold, Mr. Whitney, and the other landowners, as suggested by Mr. Tanji's article, or Mr. Harrison made the remarks directed at the media, and Mr. Tanji changed the context when he wrote the article. Regardless of the original target, however, the words are not constitutionally protected rhetorical hyperbole, despite the state courts' conclusion to the contrary.

Two decisions by this Court (both cited and argued to the trial and appellate courts below), when properly viewed, should have led to the conclusion that Mr. Harrison's words, even if quoted correctly and in the correct context, were not protected speech under the First Amendment to the Constitution of the United States: *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S. Ct. 2695, 2707, 111 L. Ed.2d 1 (1990), and *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419 (1991).

Plaintiffs' First Amended Complaint necessarily speaks for itself in terms of what Plaintiffs' allegations are concerning the defamatory language used about them by Mr. Harrison. [Lodging at 1-21.] Paragraph 11 of the First Amended Complaint quoted Mr. Harrison's statement from the newspaper article as follows:

> Have you ever been raped? I'm being

raped by all these people. My privacy is being violated. The whole issue is my privacy.

Although Mr. Harrison claimed his remarks referred to the media, in Mr. Tanji's article, Mr. Harrison's language narrowly focused his derogatory remarks on a specific group of people: the landowners who had just been successful in obtaining judicial confirmation that they had an easement over Mr. Harrison's property in Hawai'i which pre-dated Mr. Harrison's purchase of that land, and Mr. Gold and Mr. Whitney are both among those landowners.

While it is true that there was a prior case filed by these Plaintiffs against Mr. Harrison in the United States District Court for the District of Hawai'i, making essentially the same allegations against Mr. Harrison only, and while it is true that Mr. Harrison filed a motion to dismiss in that case, and while it is also true that Plaintiffs voluntarily dismissed their claims in the federal court after a claim by Mr. Harrison's lawyer that Mr. Harrison's remarks were directed at the media, those facts had no proper bearing on the issue of whether Mr. Harrison's remarks were actionable.

Mr. Harrison's counsel described the motion to dismiss in the federal case as notice to Plaintiffs that their claims were spurious, as if the mere fact that Mr. Harrison alleged that a claim was spurious necessarily made it so. Mr. Harrison's counsel also attributed the dismissal of the federal suit as an admission by Plaintiffs that the dismissal occurred after learning that Harrison's statements were directed at overzealous reporters, not them. The reason for

the federal case dismissal, however, was clearly to *evaluate* the existence of potential claims against Mr. Tanji and *The Honolulu Advertiser*, including the possibility of both defamation and false light invasion of privacy claims. A decision to dismiss a case without prejudice cannot be equated with any "admission" that the assertion that Mr. Harrison's remarks were directed at the media was in fact true. Since the presence of Hawai'i citizens would obviously destroy federal diversity jurisdiction, Plaintiffs simply exercised their right to refile the case in state court, alleging alternative theories of recovery. Further, Mr. Harrison implicitly argued, and was successful in doing so, that any attorney who files a defamation suit where the language at issue is determined later by the court to be rhetorical hyperbole, is automatically subject to sanctions for the mere filing of the suit, without regard to whether the meaning of the words is in fact defamatory. That ruling, if allowed to stand, has a chilling effect which would eliminate all such suits, and all such challenges to what some courts believe to be the current status of the law.

Mr. Harrison successfully argued below that merely because a particular statement is tagged with the description rhetorical hyperbole it is automatically protected speech under the First Amendment, and therefore cannot form the basis for a defamation suit.

That is not a correct statement of the law.

This Court has expressly held that there is no per se privilege under the First Amendment for "opinion." *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S.

Ct. 2695, 2707, 111 L. Ed.2d 1 (1990). The Court noted at 2706 that the damage done by a defamatory statement can be equally strong, regardless of whether the speaker says "Jones is a liar" or "in my opinion Jones is a liar," and pointed out that even at common law, "the privilege of fair comment did not extend to a false statement of fact, whether it was expressly ~~stated~~ or implied from an expression of opinion.' Restatement (Second) of Torts, *supra*, '566 Comment *a*." *Id.* Thus, where a First Amendment defense is raised in a defamation case, an appellate court has an obligation to make an independent examination of the entire record to "make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 2705. The Supreme Court found that the suggestion that the connotation of the language in the newspaper article that the plaintiff had perjured himself was "sufficiently factual to be susceptible of being proved true or false," *id.* at 2707, and before reversing the trial court and remanding, the Supreme Court said at 2707-2708:

> The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a

pervasive and strong interest in preventing and redressing attacks upon reputation." [Citation omitted.] Justice Stewart in that case put it with his customary clarity:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of ordered liberty.
>
> . . .
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." [Citation omitted.]

"Rhetorical hyperbole" is necessarily an aspect of the expression of an opinion, and it follows that the analysis which must be conducted of the statements alleged to be defamatory, regardless of whether the analysis is conducted in the context of a motion to dismiss or a motion for summary judgment, is one which determines whether reasonable minds can differ on that issue. Where Mr.

Harrison has claimed that his statements were directed to the press, and "understood" by members of the press to have that meaning, but where it is clear from the context of the newspaper article published by *The Honolulu Advertiser*, considered as a whole, that his statement was directed at Mr. Gold, Mr. Whitney and the other landowners who had been successful in obtaining judicial confirmation of their easement across Mr. Harrison's property, then there was a factual dispute which should have been resolved by a jury and not by the trial court.

In *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419 (1991), the Supreme Court found at 2435 that describing a teacher and author as an "intellectual gigolo" was actionable. The *Masson* phrase obviously means one who prostitutes his ideas for pecuniary gain. While one could argue that the phrase was merely rhetorical hyperbole used to express a negative opinion about someone, the Supreme Court's decision that the phrase was actionable meant that the issue was one for the jury to resolve.

Both *Milkovich* and *Masson* involved a focus by this Court on the *meaning* of the allegedly defamatory remarks, prior to a determination of whether they were actionable or protected by the First Amendment. Yet that is precisely what both the trial court and the Supreme Court of Hawai'i failed to do: they classified the remarks made by Mr. Harrison as rhetorical hyperbole, regardless of whether they were quoted accurately or not by Mr. Tanji, as to the reference, and concluded that all rhetorical hyperbole

is automatically protected speech under the First Amendment. In other words, speech which is categorized as rhetorical hyperbole enjoys an absolute and per se constitutional privilege against being actionable.

This view—that certain types or categories of speech are automatically protected by the First Amendment merely because of their status—has grown in recent years to the point where the common law tort of defamation seems to have shifted its primary focus from whether the challenged speech has defamatory meaning which harmed the plaintiff, to whether the challenged speech has some constitutional privilege.

Jeffrey E. Thomas, Assistant Professor, University of Missouri-Kansas City School of Law, has recently analyzed the state of American defamation law in relation to the importance that courts place on the meaning of an allegedly defamatory statement, and developed a pragmatic approach for *first* determining whether a statement has defamatory meaning, so that the question of whether the statement has any constitutional privilege can be determined in light of the meaning, and not in spite of it, or in complete disregard of meaning. The article is titled, "A Pragmatic Approach to Meaning in Defamation Law," and will appear in the Wake Forest Law Review in May of 1999. A copy of that article appears in the Lodging at 78-183. Professor Thomas' article discusses the definition of "meaning," the growth of constitutional privileges for categories of speech, and suggests a pragmatic approach to determine the *meaning* of a statement before consideration

of whether the statement is protected by the First Amendment.

> This meaning-based distinction for hyperbole is consistent with usual communicative discourse and supports the objective of protecting reputation. Recipients of communication seek to understand the meaning of a statement even when hyperbole is used. If the context shows that the meaning of a term like "blackmail" or "slut " is not defamatory because it was used figuratively, that is how the reader will understand it. But if the context shows a defamatory meaning, the reader will not ignore that meaning simply because it was conveyed with rhetorical hyperbole. The categorical approach does not permit this distinction, but categorically protects all statements of hyperbole regardless of their meaning. Because the categorical approach protects some rhetorical hyperbole that conveys defamatory meaning, it diminishes the ability of defamation law to protect reputation.

[Lodging at 180-181.] Professor Thomas then concluded:

> Meaning is essential to defamation. Without meaning a statement would not harm a person's reputation, and therefore would not require any compensation. The common law has long recognized a doctrinal role for meaning in defamation law. The constitutional law of defamation, however, created a large and complex

> body of law that marginalized meaning and distorted the use of linguistic factors that help determine meaning. This body of law became the focus of defamation litigation instead of the meaning, or truth or falsity, of the allegedly defamatory statement. In addition, categorical protection for statements of opinion and rhetorical hyperbole distorted the use of linguistic factors of text and context. Instead of using these factors to determine a statement's meaning, these doctrines used them to classify the statements as fact, opinion or hyperbole. The average reader, however, is more concerned with the meaning of the statement than with its categorization as fact or opinion. Furthermore, rigid categories of fact, opinion, and hyperbole fail to reflect the mixed nature of most statements. Even if they did try to classify a statement, most statements have both factual and non-factual dimensions.

*Id.* at 181.

Applying Professor Thomas' pragmatic paradigm to the speech at issue here reveals that Mr. Harrison's statements *do* have a defamatory meaning. When read in light of the context, it is clear that the statement—"Have you ever been raped? I'm being raped by all these people"—accuses those people of violating Mr. Harrison's privacy by using gross criminal-like acts in enforcing their legal rights. The verbal context of the statement shows that the statement is referring to Mr. Harrison's claims of

privacy violation. Immediately after the statement at issue, the article says that "Harrison told reporters, 'My privacy is being violated. The whole issue is my privacy.'" In addition, the headline of the article stated: "Ex-Beatle says of trial on Maui: Don't rob my privacy, no, no, no." The term "rape" therefore refers to how the violation of Mr. Harrison's privacy occurred.

This violation of privacy, however, was not with a literal act of "rape," but was by the efforts of the litigants to enforce and use an easement over Mr. Harrison's property, which had been granted to the litigants by deed and which had been used by them prior to Mr. Harrison's later acquisition of the property. The subject of the article was the "trial on whether [Harrison's] neighbors can use a path near his private home in Nahiku." The term "rape" in this context therefore is metaphorical, not literal. The metaphor refers to the criminal mental state and accompanying improper acts of the litigants in winning. Rape is forcible or nonconsensual sexual intercourse. By using that term metaphorically in the context of this article, the average reader would understand that the speaker's point was to accuse the litigants of using gross, criminal-like acts to enforce their legal rights and violate Mr. Harrison's privacy.

The maxims of what Professor Thomas calls "conversational implicature" also support this understanding of the statement's meaning.

The maxim of "relation" requires that the statement must be relevant to the discourse, or the subject. It is clear

from the above analysis that the discourse concerns Harrison's privacy, and therefore that the statement about "rape" concerns Harrison's privacy.

The maxim of "manner" suggests that the discourse will be orderly and avoid obscurity, so that the use of the term "rape" in this context must be metaphorical. That does not mean that the statement is without meaning, however.

The maxim of "quantity" suggests that the speaker (Mr. Harrison) will provide information required by the discourse, so that the statement must in some fashion advance the discourse. The most obvious way that the statement advances the discourse here is by metaphorically describing the intent and/or actions of the litigants, which of course includes Mr. Gold and Mr. Whitney.

The maxim of "quality" suggests that the speaker will only make statements for which he has evidence. Thus, based on Mr. Harrison's involvement in the underlying easement litigation, the reader would assume that Mr. Harrison had some basis for attributing improper criminal intent and/or criminal-like methods to the litigants in pursuing their legal rights.

As can be seen, there *is* a defamatory meaning to Mr. Harrison's words, whether the analysis is one consistent with Professor Thomas' "pragmatic paradigm" or whether the speech is viewed as metaphorically accusing Mr. Gold, Mr. Whitney and the others of criminal conduct similar to rape in their litigation efforts.

Despite the trial court's assertion in granting

summary judgment in favor of Mr. Harrison that there was "no good faith allegation or contention that the allegation of rape was anything more than colorful non-factual figurative speech, regardless of the identity of the persons at whom the remarks were targeted," [Appendix at 40], there is absolutely nothing in this record to demonstrate that the argument was anything other than a good-faith argument. The reality is that Plaintiffs' counsel was unsuccessful in persuading the trial court that his interpretation of the relevant law—*Milkovich* and *Masson*—was correct, and as "punishment" for unsuccessful advocacy, not only was summary judgment granted in favor of Mr. Harrison, but sanctions were awarded against Mr. Pickett.

Considered in the context of the entire article, and considered in light of the fact that there is some uncertainty about to whom Mr. Harrison was directing his statements, and thus the grant of summary judgment in favor of *any* of the Defendants was in conflict with the principles of both *Milkovich* and *Masson*. Both the trial court and the Supreme Court of Hawai'i clearly ignored any question of the meaning of the Harrison statements, focused solely on whether the statements could be categorized as rhetorical hyperbole, and then concluded that all rhetorical hyperbole is per se protected by the First Amendment, and therefore anyone who questions that per se protection is acting frivolously.

This Court should grant certiorari: (1) to determine whether or not there is an automatic, per se constitutional privilege under the First Amendment for speech that can be

categorized as rhetorical hyperbole, (2) to determine whether the *meaning* of a statement must be determined before consideration of any constitutional privilege, and (3) to determine whether the decision of the Supreme Court of Hawai'i in this case conflicts with the holdings and principles of *Milkovich* and *Masson*.

The leading Hawai'i case on the issue of Rule 11 sanctions in the form of attorney fees is *Enos v. Pacific Transfer & Warehouse, Inc.*, 79 Haw. 452, 903 P.2d 1273 (1995). In *Enos*, the plaintiff had obtained a judgment, and prior to the posting of any supersedeas bond, sought to execute on the judgment and instituted a proceeding to examine a third party concerning assets of Pacific Transfer. The supersedeas bond was posted, but the examination proceeding was not withdrawn quickly, and the trial court awarded sanctions against one of Pacific Transfer's counsel. After quoting Hawai'i Rule of Civil Procedure 11 (which is virtually identical to Fed. R. Civ. P. 11), the Supreme Court of Hawai'i said:

> "The cornerstone of Rule 11 is the certification requirement; that is, Rule 11 sanctions must be based on the signature of an attorney or client on a pleading, motion, or other paper in a lawsuit." [Citations omitted.] Rule 11 'does not license a court to sanction any action by an attorney or party that it disapproves of[.]" [Citations omitted.]

*Enos*, *supra*, 79 Haw. at 458, 903 P.2d at 1279. The Court said later that in order to facilitate meaningful and efficient

appellate review, "an order imposing sanctions should set forth findings that describe, with reasonable specificity, the perceived misconduct (such as harassment or bad faith conduct), as well as the appropriate sanctioning authority...." *Id.*, 79 Haw. at 459, 903 P.2d at 1280. The trial court awarded sanctions against Mr. Pickett with the ruling that appears at Appendix at 41.

What the trial court was really saying was that because it disagreed with Mr. Pickett's interpretation of existing law on the issue of rhetorical hyperbole; because Mr. Pickett did not persuade the trial court that his interpretation and understanding of the applicable law was correct; because Mr. Pickett, on behalf of his clients, previously exercised a right under Fed. R. Civ. P. 41 to voluntarily dismiss a case without prejudice and then re-file the case; because Mr. Pickett exercised his clients' right under HRCP 8(e)(2) to plead inconsistent theories, and because Mr. Pickett did not accept the trial court's ruling on the Gannett/Tanji motion for summary judgment as being correct, Mr. Pickett should be punished with $12,504.48 in sanctions, which with interest totaled $15,092.63.

None of those grounds, individually or collectively, were sufficient to support the imposition of sanctions against Mr. Pickett, nor was the fact that Mr. Pickett was unsuccessful in persuading the Supreme Court of Hawai'i that his view of the proper interpretation of *Milkovich* and *Masson*, in particular, was correct, warrant the imposition of further sanctions totaling $30,189.65 between the award to Mr. Harrison and the award to the media defendants.

But of even greater significance is the fact that at no time was Mr. Pickett allowed to present evidence at a hearing to defend the assaults being made on his integrity.

In opposition to the Gannett/Tanji motion for summary judgment on the defamation and false light invasion of privacy claims, Mr. Pickett argued the question of rhetorical hyperbole in the context of existing law. He attempted in good faith to persuade the trial court that there was a viable claim against the newspaper defendants, if they had in fact made up the statements attributed to Mr. Harrison, or if they had quoted the language correctly, but then in the published article, directed the statement to the litigants instead of to the media, which was the target asserted by Mr. Harrison. Mr. Pickett was unsuccessful in doing so, but a mere lack of success in persuading a trial court to deny the first of two motions for summary judgment hardly constitutes a basis for imposing sanctions, particularly where the sanctions are imposed *not* on the basis of Mr. Pickett's actions in defending the first motion for summary judgment but because he did not give up the case and dismiss the claims against Mr. Harrison, and instead proceeded to represent his clients by pursuing the claim against the remaining defendant in the case.

The trial court pointed out that the arguments against the newspaper defendants and Mr. Harrison were inconsistent. If the arguments were inconsistent, then following a ruling in favor of the newspaper defendants, what impropriety could there be, particularly an "impropriety" warranting imposition of sanctions, in

pursuing the claim against the remaining defendant? The answer is, "None." What the trial court was really saying was that it was punishing Mr. Pickett for not agreeing with the trial court's ruling on the newspaper defendants' motion for summary judgment, and inferentially, for not immediately dismissing the case against Mr. Harrison. As the record reflects, Mr. Harrison had not yet been served as of the date of the trial court's granting of summary judgment in favor of the media defendants. Therefore all issues and claims against all parties had not been decided and the grant of summary judgment in favor of the newspaper defendants was not then appealable. Nothing in the law requires a party who loses a motion for summary judgment as to one defendant in a multi-defendant case to seek certification for an immediate appeal. Instead, Mr. Pickett properly represented his clients by pursuing the claim against Mr. Harrison so that if the claims against Mr. Harrison were dismissed, thereby disposing of all claims and issues against all parties, then the matter would be ripe for an appeal.

The trial court cited no authority for the proposition that sanctions under Rule 11 may be imposed because an attorney fails to persuade the trial court that his legal arguments are correct.

The trial court cited no authority for the proposition that the exercise of a right under the Federal Rules of Civil Procedure to voluntarily dismiss a case without prejudice and then re-file it, can serve as a reason for imposing sanctions on the attorney who does so. The fact was that

the original federal suit was against Mr. Harrison alone, during which it came to the attention of Plaintiffs' counsel from Mr. Harrison's counsel that there was a possibility that Mr. Harrison was directing his rape comments at the media, but that the present newspaper defendants had either distorted what Mr. Harrison said to make it appear his comments were directed at Plaintiffs and other landowners adjoining Mr. Harrison's Hawai'i property, or had perhaps even misquoted him completely. The legal effect of a voluntary dismissal without prejudice is clearly as if the case had never been filed in the first place. It may never in fact be re-filed, or it may be re-filed within the appropriate "savings" period that permits a voluntarily-dismissed suit to be re-filed. The latter is what happened in this case. Plaintiffs had a right to voluntarily dismiss the federal suit. They did so. Plaintiffs had a right to re-file that suit against the original defendant (Mr. Harrison) and name additional defendants (the media defendants). They exercised that right. There is nothing in the law that says the exercise of rights granted by federal or state statutes or rules of civil procedure can serve as the basis for imposition of sanctions.

At the stage at which this defamation litigation ended in the state courts (with Mr. Harrison's appeal of his loss of the easement case still pending in the Supreme Court of Hawaii' since 1994), the only thing really known about what Mr. Harrison may or may not have said is what was reported in *The Honolulu Advertiser* newspaper article. Whether the words were quoted correctly, and whether the

words were aimed at the media or at Plaintiffs and other adjoining landowners is in fact unknown as a matter of law, since there are two conflicting versions: the newspaper article targeted the landowners and Mr. Harrison claims he targeted the media. Mr. Pickett made an unsuccessful legal argument against Mr. Harrison's motion for summary judgment. The argument, even though found to be unpersuasive or erroneous by the trial court, certainly did not demonstrate the "bad faith" which was implicit in the trial court's assertion that Plaintiffs, through Mr. Pickett, sought to "ignore controlling precedent and to misapply prevailing constitutional doctrine."

Taken as a whole, the trial court seemed really to be punishing Mr. Pickett for disagreeing with the trial court's ruling on the rhetorical hyperbole issue in the Gannett/Tanji motion for summary judgment. If Mr. Pickett had given up at that point and gone away, then there would have been no imposition of sanctions. The Gannett/Tanji motion was decided on the basis that whatever Mr. Harrison said was constitutionally protected hyperbole, yet the trial court did not feel at that time that Mr. Pickett had violated Rule 11. It was only when Mr. Pickett implicitly disagreed with that ruling, and pursued the claim against Mr. Harrison so that if he was unsuccessful there all the issues might be resolved on appeal, that the trial court decided Mr. Pickett should be sanctioned. Yet the document out of which these Rule 11 sanctions arose, Mr. Pickett's signature on the Complaint and/or the First Amended Complaint are identical as to the rhetorical hyperbole issues in both motions for summary

judgment.

Nothing in this record demonstrates any kind of bad faith which would warrant imposition of these sanctions, and the record considered in its entirety demonstrates that the trial court abused its discretion by awarding sanctions in any amount against Mr. Pickett. Before granting the sanctions, the trial court should have held an evidentiary hearing, and therefore these sanctions violated Mr. Pickett's right to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Supreme Court of Hawai'i has recognized the fundamental concept that due process requires notice and a meaningful opportunity to be heard in *Evans v. Takao*, 74 Haw. 267, 282, 842 P.2d 255, 262 (1992), and in *Kernan v. Tanaka*, 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993). Similarly, this Court has said in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491, 84 L. Ed.2d 494 (1985):

> Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." [Citations omitted.]

And this Court later said:

> The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.

*Id.*, 470 U.S. at 541, 105 S. Ct. at 1493. Once it is clear the

Due Process Clause is applicable a particular situation, "the question remains what process is due." *Id.*

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 313, 70 S. Ct. 652, 656, 94 L.Ed. 865 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." [Citations omitted.]

*Id.*, 470 U.S. at 542, 105 S. Ct. at 1493.

Yet the trial court in this case was permitted to ignore both its own highest court's statement of constitutional due process principles, and clearly ignored the same principles enunciated by *this* Court, by failing to provide an evidentiary hearing to Mr. Pickett after his request for one, on the issue of the imposition of sanctions against him. And the Supreme Court of Hawai'i did the same thing by imposing sanctions against Mr. Pickett for filing an allegedly frivolous appeal as to the summary judgment granted in favor of the media defendants, without providing Mr. Pickett an effective opportunity to be heard. It should be remembered that the Supreme Court of Hawai'i went straight from a decision that pursuing an appeal of the decision in favor of Mr. Harrison was frivolous, to determining the amount of sanctions to be awarded against

Mr. Pickett in favor of the media defendants, without the intervening step of first allowing Mr. Pickett an opportunity to demonstrate that there was not only a legitimate basis for the initial suit against all defendants, but for pursuing the appeal against the media defendants as well.

The request for sanctions by Mr. Harrison in the trial court and on appeal placed Mr. Pickett's integrity at issue. So did the post-appeal request of the media defendants. The ruling against Mr. Pickett on those requests for sanctions clearly deprived him of property: initially a $12,504.48 (with interest, $15,092.63) award of attorney fees and expenses to Mr. Harrison, and later another $30,189.65 to Mr. Harrison and the media defendants on appeal. The denial of an evidentiary hearing deprived Mr. Pickett of his property (a substantial sum of money), with absolutely no meaningful opportunity to be heard. The denial of a hearing deprived Mr. Pickett of the right to explain directly to the trial court and in detail, his reasoning, or for example, whether he consulted experts before deciding to file suit in the first place. The request for sanctions placed Mr. Pickett's credibility at issue, and he should have been given an opportunity to testify in his own behalf, and/or to offer expert testimony to show that there was a legally sound basis for filing the suit in state court and for pursuing the appeal, and that he acted in good faith, consistent with the principles of H.R.C.P. 11, for filing the suit and pursuing it on appeal.

Mr. Pickett has paid more than $45,000 in sanctions. It can hardly be argued that Mr. Pickett does not

have a constitutionally-protected interest in due process before he is compelled by order of a state court to pay money to someone else. Mr. Pickett requested an evidentiary hearing on the issue of sanctions. No such hearing was held. Yet Mr. Pickett has a constitutionally-protected right to be heard in his own behalf not only on the propriety of the imposition of sanctions at all, but on the nature and extent of those sanctions. The state courts' denial of any evidentiary hearings on the question of sanctions deprived Mr. Pickett of an opportunity not only to challenge the amount of attorney fees and expenses being sought, but to challenge the merits of the claim that sanctions should be imposed at all, just because Mr. Pickett filed and then pursued these defamation and other tort claims against these defendants. The imposition of sanctions by the Supreme Court of Hawai'i was at least as constitutionally defective, since the sanctions were imposed at least in part because Mr. Pickett did not make any "new" arguments on appeal, but rather tried to persuade the Supreme Court of Hawai'i that the trial court had erred in the first place in its interpretation of *Milkovich*, *Masson*, and the other cases cited and argued.

But where the Supreme Court of Hawai'i, in *Enos*, *supra*, has placed such a high degree of emphasis on the necessity for careful consideration and articulation of the bases for imposition of Rule 11 sanctions and/or imposition of sanctions under a trial court's "inherent powers," it should follow that an evidentiary hearing is constitutionally necessary, and is particularly necessary where the non-

moving party requests the opportunity to be heard.

Imposition of financial sanctions against an attorney is essentially a mini-trial proceeding. There must be a basis in fact for imposition of sanctions, and legal authority to do so. This is no different than any civil litigation, where there must be both a legal and factual basis for an award of damages in favor of a plaintiff. It would certainly be a violation of a defendant's due process rights in a civil case for the trier of fact to determine liability based solely on written arguments of the parties, and then determine the amount of damages to be awarded based solely on evidence presented by the plaintiff, without allowing the defendant any opportunity to rebut that evidence. There is no difference between that situation and the one in the trial court below. By denying an evidentiary hearing, the trial court deprived Mr. Pickett of the right to make a meaningful challenge to both the issue of imposition of sanctions, the nature of the sanctions, and if the sanctions were to be monetary, to the amount of sanctions.

The imposition of sanctions in this setting also raises a significant question of the chilling effect of the use of a court's authority to impose sanctions against attorneys where the attorney does nothing more than rely on a valid interpretation of two of this Court's then-most-recent decisions on the use of meaning in defamation law, *Milkovich* and *Masson*, to try to persuade first a trial court and then an appellate court that a particular statement, considered in context and with reference to the meaning which would be ascribed to it by ordinary readers, was

defamatory and tortious, regardless of whether or not the statement could be categorized as rhetorical hyperbole.

This Court should grant this Petition for a Writ of Certiorari in order: (1) to determine whether the Due Process Clause requires an evidentiary hearing on the issue of Rule 11 sanctions in a factual setting such as this one, and/or (2) to determine the nature and extent of a meaningful opportunity to be heard under the Due Process Clause with reference to the imposition of sanctions, and/or (3) to determine whether the imposition of sanctions for an unsuccessful argument over the interpretation of this Court's cases has a chilling effect under the First Amendment on the vigorous representation by attorneys of their clients.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the Supreme Court of Hawai'i should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Steven Philip GOLD and Scott Howard Whitney,
Plaintiffs-Appellants,

v.

George HARRISON, Gannett Pacific Corporation, dba The Honolulu Advertiser, and Edwin Tanji, Defendants-Appellees.

No. 20468.
Supreme Court of Hawai'i.
October 22, 1998.

**AMENDED NOTICE AND JUDGMENT ON APPEAL**

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI'I.

PLEASE TAKE NOTICE the following Amended Judgment on Appeal is entered this day by the Supreme Court of the State of Hawai'i:

Pursuant to the opinion of the Supreme Court entered on July 8, 1998, and the Order Granting Motion for Attorney's Fees, filed on August 28, 1998 (A) the Final Judgment Against Plaintiffs in favor of Defendants, entered January 10, 1997; (B) the Order Granting Summary Judgment in Favor Of Defendants Gannett Pacific

Corporation dba The Honolulu Advertiser and Edwin Tanji, As To Any And All Claims Asserted By Plaintiffs Against Them in Plaintiffs' First Amended Complaint, filed October 17, 1995; and (C) the Order Granting Defendant George Harrison's Motion (2) to Dismiss With Prejudice Plaintiffs' First Amended Complaint Filed July 21, 1995, and (2) For Rule 11 Sanctions and/or Attorneys' Fees, entered on November 14 ,1996, are affirmed. Defendant Harrison's motion for attorneys' fees and costs on appeal pursuant to HRAP 38 is granted in the amount of $26,110.50

DATED: Honolulu, Hawai'i October 22, 1998.

By the Court:

/s/ Ky. Miyamura
Clerk of the Court

APPROVED:

Paula A. Nakayama
Justice of the Supreme Court
of the State of Hawai'i

Steven Philip GOLD and Scott Howard Whitney,
Plaintiffs-Appellants,

v.

George HARRISON, Gannett Pacific Corporation, dba The Honolulu Advertiser, and Edwin Tanji, Defendants-Appellees.

No. 20468.
Supreme Court of Hawai'i.
July 8, 1998

Edward D. Magauran, Honolulu, and William H. Pickett, on the briefs, for plaintiffs-appellants.

Paul Alston, Susan Jameson and Marilyn Chung Ushijima of Alston Hunt Floyd & Ing, on the briefs, Honolulu, for defendant-appellee George Harrison.

Jeffrey S. Portnoy and Peter W. Olson of Cades Schutte Fleming & Wright, on the briefs, Honolulu, for defendants-appellees Gannett Pacific Corporation dba The Honolulu Advertiser and Edwin Tanji.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

NAKAYAMA, Justice.

This case arises out of statements made by defendant-appellee George Harrison to defendant-appellee

Edwin Tanji, a reporter for defendant-appellee The Honolulu Advertiser (The Advertiser), during a trial involving Harrison's property on Maui that established an easement over Harrison's property in favor of his neighbors, including, inter alia, plaintiffs-appellants Steven Philip Gold and Scott Howard Whitney (collectively, the Plaintiffs).

During trial, an article in The Advertiser quoted Harrison as saying, "Have you ever been raped? I'm being raped by all these people.... My privacy is being violated. The whole issue is my privacy." The Plaintiffs thereafter filed a twelve-count complaint against Harrison, The Advertiser, and Tanji in the Second Circuit Court, alleging oral defamation, false light/invasion of privacy, intentional infliction of emotional distress, written defamation, and negligence.

After Harrison, The Advertiser, and Tanji prevailed on motions for summary judgment, the circuit court entered final judgment against the Plaintiffs. In addition, the circuit court awarded Harrison attorneys' fees pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 11, to be paid by the Plaintiffs' counsel, William H. Pickett.

On appeal, the Plaintiffs raise the following as points of error: (1) the circuit court erred when it granted summary judgment in favor of Harrison, The Advertiser, and Tanji because there was a genuine issue of material fact as to whether Harrison's statements were false and

defamatory; (2) the circuit court abused its discretion when it imposed HRCP Rule 11 sanctions against Pickett; and (3) the circuit court abused its discretion and denied Pickett due process of law when it failed to hold an evidentiary hearing on the HRCP Rule 11 sanctions.

Harrison contends that the Plaintiffs' appeal is frivolous and that he should be awarded attorneys' fees and costs pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 38.

We affirm: (1) the final judgment; (2) the circuit court order granting The Advertiser and Tanji's motions for summary judgment; and (3) the circuit court order granting Harrison's motion for summary judgment and HRCP Rule 11 sanctions. We also grant Harrison's request for attorneys' fees and costs pursuant to HRAP Rule 38.

## I. BACKGROUND

### A. THE EVENTS LEADING TO THIS LITIGATION

The Plaintiffs claim that they were defamed in an article entitled "Ex-Beatle says of trial on Maui: Don't rob my privacy, no, no, no," published in The Honolulu Advertiser on July 21, 1993. In the article, Harrison was quoted as saying: "Have you ever been raped? I'm being raped by all these people.... My privacy is being violated. The whole issue is my privacy" (Harrison's Statement).

The article was written by Tanji and concerned litigation in the Second Circuit Court involving Harrison's property in Nahiku, Maui (the Easement Action). In the Easement Action, the Plaintiffs sought to establish that they and other neighboring property owners owned an easement over Harrison's land. Harrison opposed their claim and testified regarding, inter alia, his need for privacy. Harrison's Statement was made after the circuit court ruled that an easement existed over Harrison's land in favor of the Plaintiffs and other neighboring property owners. The trial continued on to determine the exact location of the easement. The Plaintiffs were not named in the article.

B. THE PLAINTIFFS' FEDERAL COURT ACTION

On August 11, 1993, the Plaintiffs filed suit in the United States District Court for the District of Hawai'i, alleging claims of defamation, false light/invasion of privacy, and punitive and exemplary damages against Harrison (the Federal Action). Pickett was lead counsel in the case. [FN1]

FN1. Pickett is an attorney licensed to practice law in the state of Missouri and practices in Kansas City, Mo. Pickett was originally retained by the Plaintiffs as their attorney in the Easement Action.

On October 5, 1993, Pickett received a fax from local Hawai'i counsel informing him that, at an interview

with other reporters who were present at the time Harrison's Statement was made to the press, the other reporters had suggested that Harrison's Statement was intended to be directed at the press or the media, rather than at the neighboring property owners, including the Plaintiffs, who had prevailed in the Easement Action against Harrison. This raised the possibility of a claim of defamation against The Advertiser and Tanji, which would have destroyed diversity jurisdiction.

On October 6, 1993, the Plaintiffs voluntarily dismissed the Federal Action without prejudice.

C. THE PLAINTIFFS' CIRCUIT COURT ACTION

On July 19, 1995, the Plaintiffs filed a civil complaint in the Second Circuit Court. Two days later, the Plaintiffs filed a first amended complaint. The Plaintiffs alleged claims of oral defamation, false light/invasion of privacy, intentional infliction of emotional distress, written defamation, and negligence. Harrison, The Advertiser, and Tanji were named as defendants. [FN2]

FN2. Although Pickett's name appeared in the complaint as an attorney for the Plaintiffs, local counsel signed the complaint. Local counsel in the circuit court action was different from local counsel in the Federal Action. Pickett was admitted to practice pro hac vice in this case a month later, in an order filed by the circuit court, on September

25, 1995.

On August 11, 1995, The Advertiser, and Tanji filed a motion to dismiss, arguing that Harrison's Statement was not false and defamatory because, as "rhetorical hyperbole," it was constitutionally protected speech under the first amendment to the United States Constitution. The Advertiser and Tanji's motion to dismiss was based on HRCP Rule 12(b)(6), but because the circuit court considered evidence outside the pleadings, specifically, the full text of the newspaper article, the circuit court treated the motion to dismiss as a motion for summary judgment pursuant to HRCP Rule 56. [FN3]

FN3. HRCP Rule 12(b) provides in pertinent part: If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [HRCP] Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [HRCP] Rule 56.

In response, the Plaintiffs argued that the motion should be denied because the published newspaper article distorted Harrison's actual words. The Plaintiffs argued that Harrison's Statement was actually directed at the media and that the Article distorted Harrison's Statement so that it

appeared-- falsely--that the Plaintiffs were the "rapists" that Harrison was complaining about. After a hearing, the circuit court granted the motion for summary judgment on October 17, 1995.

On February 6, 1996, the circuit court filed a notice of dismissal, stating that it would dismiss the case because Harrison had not been served with the complaint. The Plaintiffs opposed the notice of dismissal. The circuit court withdrew the notice of dismissal in an order filed February 20, 1996, on the condition that the Plaintiffs serve Harrison with the complaint on or before May 17, 1996.

On May 16, 1996, Harrison was served by a private process server, Jason Tierney, who left the summons and accompanying pleadings with Harrison's adult brother at Harrison's home in Great Britain. [FN4]

FN4. Harrison argues that he was not properly served because (1) he was not served according to the applicable international law, and (2) his brother was "touch served," i.e., Tierney touched Harrison's brother's hands with the complaint and let it drop to the ground. In light of our disposition in this case, we need not reach the issue of whether Harrison was properly served with the complaint. See infra note 7.

On July 1, 1996, Harrison filed a motion to dismiss, seeking: (1) to dismiss the Plaintiffs' first amended

complaint, contending that Harrison's Statement was not false and defamatory, because as rhetorical hyperbole, it was constitutionally protected speech; and (2) HRCP Rule 11 sanctions and/or attorneys' fees against Pickett. Harrison's motion to dismiss was based on HRCP Rule 12(b)(6), but because the circuit court considered evidence outside the pleadings, specifically, the full text of the newspaper article, the circuit court treated the motion to dismiss as a motion for summary judgment pursuant to HRCP Rule 56. [FN5]

FN5. See supra note 3. Hereinafter, Harrison, The Advertiser, and Tanji's motions to dismiss will be referred to as motions for summary judgment.

On September 11, 1996, after a hearing, the circuit court orally granted Harrison's motion for summary judgment and HRCP Rule 11
sanctions.

On November 12, 1996, Pickett submitted to the circuit court an ex parte motion for an evidentiary hearing to determine whether HRCP Rule 11 sanctions should have been awarded, and whether the amount of sanctions ordered to be paid were just and reasonable. In the affidavit in support of his ex parte motion, Pickett stated that "[a]ll actions with respect to the filing and prosecution of this case ... were taken by me and my firm, as lead counsel for Plaintiffs." The circuit court denied Pickett's ex parte

motion for an evidentiary hearing and returned the motion to Pickett unsigned. Pickett filed the unsigned ex parte motion in the circuit court record on November 27, 1996.

On November 14, 1996, the circuit court filed an order granting summary judgment in favor of Harrison and awarding HRCP Rule 11 sanctions in favor of Harrison against Pickett (the Harrison Order).

In the Harrison Order, the circuit court ruled that the first amended complaint should be dismissed for three independent reasons:

First, the allegedly defamatory statements attributed to Defendant Harrison are non-defamatory constitutionally protected rhetorical hyperbole; there is no good faith allegation or contention that the allegation of "rape" was anything more than colorful non-factual figurative speech, regardless of the identity of the persons at whom the remarks were targeted. Second, the Plaintiffs previously sought to validate their claim in this case against Defendants [The Advertiser] and Edwin Tanji on the basis that they distorted Defendant Harrison's statements to make it appear, falsely, that Defendant Harrison was disparaging the Plaintiffs when, in fact, he was disparaging overly zealous members of the news media. Having sought to hold [The Advertiser] and Tanji liable on that factual premise--which is inconsistent with imposing liability on Defendant Harrison--Plaintiffs are now estopped, under

Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 664 P.2d 745 (1983) from arguing that Defendant Harrison defamed them or placed them in a false light. Third, pursuant to this court's February 20, 1996 Order Withdrawing Notice of Dismissal, Plaintiffs were required to make proper service on Defendant Harrison on or before May 17, 1996. Plaintiffs have failed to prove that service was made within that deadline in a manner consistent with the requirements of the Hague Service Convention. (Emphasis added.)

The circuit court also assessed sanctions against Pickett pursuant to HRCP Rule 11, stating:

For the reasons set forth above the claim against Defendant Harrison was not well grounded in fact or warranted by either existing law or a good faith argument for the extension, modification[,] or reversal of existing law. Indeed, Plaintiffs did not urge any change in the law; instead, they sought to ignore controlling precedent and to misapply prevailing constitutional doctrine. It should not have been necessary for Defendant Harrison to bring this motion or otherwise defend himself in this action. Plaintiffs have offered no plausible argument for imposing liability on Defendant Harrison under existing law or under any new legal theory which has any chance of success. This conclusion is reinforced by (1) the Plaintiffs' failure to explain why Defendant Harrison's statements were not constitutionally protected hyperbole, (2) the Plaintiffs' dismissal of their prior federal action against Harrison[,]

and (3) by the court's ruling in favor of Defendants [The Advertiser] and Tanji and by Plaintiffs' prior inconsistent arguments concerning the intended target of the statements attributed to Defendant Harrison. (Emphasis added.)

The circuit court required Pickett to pay Harrison's attorneys' fees and costs, in the amount of $12,504.48, as the HRCP Rule 11 sanction.

On January 10, 1997, final judgment was entered against the Plaintiffs in favor of Harrison, The Advertiser, and Tanji. The Plaintiffs' timely appeal followed.

## II. STANDARDS OF REVIEW

The Plaintiffs argue that the circuit court erred when it granted Harrison, The Advertiser, and Tanji's motions for summary judgment. This court discussed the review of an award of summary judgment in Budget Rent-A-Car Systems v. Ricardo, 85 Hawai'i 243, 942 P.2d 507 (1997).

Under the Hawai'i Rules of Civil Procedure (HRCP), summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HRCP Rule 56 (1993). The evidence should be viewed in the light most favorable to the non-moving party. Maguire

v. Hilton Hotels Corp., 79 Hawai'i 110,
112, 899 P.2d 393, 395 (1995). On appeal, an order of summary judgment is reviewed de novo under the same standard. Harris v. DeSoto, 80 Hawai'i 425, 431, 911 P.2d 60, 66 (1996).

Id. at 244, 942 P.2d at 508.

"A trial court's findings of fact are reviewed to see if they are clearly erroneous[.]" Furukawa v. Honolulu Zoological Society, 85 Hawai'i 7, 12, 936 P.2d 643, 648, reconsideration denied, 85 Hawai'i 196, 940 P.2d 403 (1997) (citing Hirono v.
Peabody, 81 Hawai'i 230, 232, 915 P.2d 704, 706 (1996)). "A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." Aickin v. Ocean View Inv. Co., Inc., 84 Hawai'i 447, 453, 935 P.2d 992, 998 (1997) (quoting Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994)).

"[C]onclusions of law are reviewed under the right/wrong standard." Furukawa, 85 Hawai'i at 12, 936 P.2d at 648 (citing Peabody, 81 Hawai'i at 232, 915 P.2d at 706). Under the de novo or right/wrong standard, this court "examine[s] the facts and answer the question without being required to give any weight to the trial court's answer to it." Aickin, 84 Hawai'i at 453, 935 P.2d at 998 (ellipsis

and citations omitted). "[A] conclusion of law is not binding upon the appellate court and is freely reviewable for its correctness." Tabieros v. Clark Equipment Co., 85 Hawai'i 336, 350, 944 P.2d 1279, 1293 (1997) (citations and internal quotation marks omitted).

"All aspects of a HRCP Rule 11 determination should be reviewed under the abuse of discretion standard." Lepere v. United Public Workers, Local 646, AFL-CIO, 77 Hawai'i 471, 473, 887 P.2d 1029, 1031 (1995) (quoting In re Tax Appeal of Hawaiian Flour Mills, 76 Hawai'i 1, 15, 868 P.2d 419, 433 (1994)); see also Enos v. Pacific Transfer & Warehouse, Inc., 79 Hawai'i 452, 459 n. 7, 903 P.2d 1273, 1280 n. 7, reconsideration denied, 80 Hawai'i 187, 907 P.2d 773 (1995) (an award of HRCP Rule 11 sanctions is reviewed for abuse of discretion). "An abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State ex rel. Bronster v. United States Steel Corp., 82 Hawai'i 32, 54, 919 P.2d 294, 316 (1996) (citations and internal quotation marks omitted).

## III. DISCUSSION

### A. THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF HARRISON, THE ADVERTISER, AND TANJI.

The Plaintiffs contend that the circuit court erred when it granted Harrison, The Advertiser, and Tanji's motions. Specifically, the Plaintiffs argue that there was a genuine issue of material fact as to whether Harrison's Statement was false and defamatory. We disagree.

This court discussed the elements of defamation in Dunlea v. Dappen, 83 Hawai'i 28, 924 P.2d 196 (1996).

In order to sustain a claim for defamation, a plaintiff must establish the following four elements:
(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher [actual malice where the plaintiff is a public figure]; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id. at 36, 924 P.2d at 204 (brackets in original) (quoting Beamer v. Nishiki, 66 Haw. 572, 578-79, 670 P.2d 1264, 1271 (1983) (quoting Restatement (Second) of Torts s 558 (1977))).

The threshold issue in defamation cases is whether, as a matter of law, the statements at issue are reasonably susceptible of a defamatory meaning. Fernandes v. Tenbruggencate, 65 Haw. 226, 228, 649 P.2d 1144, 1147

(1982). "Where the court finds that the statements are not susceptible to the meaning ascribed to it by [the] plaintiff[s], the case should not be sent to the jury." Id. at n. 1, 649 P.2d at 1147 n. 1 (citing Restatement (Second) of Torts s 614, cmt. (b); Kernick v. Dardanell Press, 428 Pa. 288, 236 A.2d 191 (1967)). Additionally, the United States Supreme Court has "recognized constitutional limits on the type of speech which may be the subject of state defamation actions." Milkovich v. Lorain Journal Co., 497 U.S. 1, 16, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

Hawai'i appellate courts have not established a standard for determining whether the statements in a defamation case are false and defamatory. The Ninth Circuit, in interpreting Milkovich, developed a three-part test for determining whether a statement was false and defamatory:

(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact[;] (2) whether the defendant used figurative or hyperbolic language that negates that impression [;] and (3) whether the statement in question is susceptible of being proved true or false.

Fasi v. Gannett Co., Inc., 930 F.Supp. 1403, 1409 (D.Hawai'i 1995), aff'd, 114 F.3d 1194 (9th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 302, 139 L.Ed.2d 233 (1997) (quotation marks omitted) (emphasis added) (quoting

Partington v. Bugliosi, 56 F.3d 1147, 1153 (9th Cir.1995)); see also Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir.1990), cert. denied, 499 U.S. 961, 111 S.Ct. 1586, 113 L.Ed.2d 650 (1991).

We adopt the three-part test as set forth by the Ninth Circuit to determine whether a statement is false and defamatory under the first amendment to the United States Constitution and article I, section 4 of the Hawai'i Constitution. Examining Harrison's Statement using the Ninth Circuit's three- part test, we reach the same conclusion as the circuit court, that Harrison's Statement was not false and defamatory, but rhetorical hyperbole--figurative or hyperbolic language that would negate the impression that Harrison was asserting an objective fact about the Plaintiffs.

The U.S. Supreme Court first discussed rhetorical hyperbole in Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). In Bresler, Bresler was a prominent real estate developer attempting to secure zoning variances on land he owned while the Greenbelt City Council was attempting to acquire other land that Bresler owned for a school. Id. at 7, 90 S.Ct. 1537. At several city council meetings, various citizens characterized Bresler's actions in negotiating as "blackmail," and this was reported in the local newspaper. Id. at 7-8, 90 S.Ct. 1537. Bresler filed a suit for libel against the local newspaper, arguing that its articles had

imputed to him the crime of blackmail. Id. at 8, 90 S.Ct. 1537. In rejecting Bresler's claim for libel, the Court stated:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else though Bresler had been charged with a crime.

Id. at 14, 90 S.Ct. 1537 (emphasis added) (footnoted omitted).

Following Bresler, the Court rejected another libel claim on the grounds that the words sued upon were non-actionable rhetorical hyperbole in Old Dominion Branch No. **361 *102 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) (Letter Carriers ). In Letter Carriers, the Court held that a union newsletter calling plaintiffs who worked during a strike "traitors" was not

libelous, because it was "similarly impossible to believe that any reader" reasonably would have understood the newsletter as accusing the plaintiffs of treason. Id. at 285, 94 S.Ct. 2770.

In the decades since Bresler and Letter Carriers, the Court has counseled that the judiciary must remain "particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions." Hustler Magazine v. Falwell, 485 U.S. 46, 51, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (rejecting emotional distress claim arising out of a parody cartoon depicting Rev. Jerry Falwell because cartoon could not have reasonably been interpreted as stating actual facts about Rev. Falwell).

Most recently, in Milkovich, the Court reaffirmed the absolute protection for expressions that, in context, cannot be interpreted as statements of fact.

[T]he Bresler--Letter Carriers--Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. Falwell, 485 U.S. at 50, 108 S.Ct. 876. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the disclosure of our Nation.

Milkovich, 497 U.S. at 20, 110 S.Ct. 2695 (citation omitted). See also Fasi, 930 F.Supp. at 1410 (use of "Blackmail incorporated," "Frank 'The Extortionist' Fasi," and "legalized blackmail" to describe Honolulu Mayor Frank Fasi was "rhetorical hyperbole" and "imaginative expression" protected by the first amendment); Partington, 56 F.3d at 1157 ("rhetorical hyperbole" and "imaginative expression" enlivens writers' prose and is protected by the first amendment).

The case at bar falls squarely within the Bresler--Letter Carriers-- Falwell line of cases. Harrison's Statement related to the Easement Action regarding the existence of an easement across Harrison's property. Harrison's Statement was an expression of his frustration over the circuit court's decision in the Easement Action, apparently prompted by his belief that the decision would compromise his privacy. Even the most casual reader would understand that "these people"--whether neighbors of Harrison or persistent journalists--were not actually raping Harrison. Because Harrison's Statement could not have reasonably been interpreted as stating actual facts about the Plaintiffs, i.e., that they were rapists, Harrison's Statement was rhetorical hyperbole and protected by the first amendment. Milkovich, 497 U.S. at 20, 110 S.Ct. 2695, Falwell, 485 U.S. at 50, 108 S.Ct. 876, Letter Carriers, 418 U.S. at 285-86, 94 S.Ct. 2770; Bresler, 398 U.S. at 14-15, 90 S.Ct. 1537. [FN6]

FN6. Cases in other jurisdictions have also held that the use of the word "rape" or "rapist" was rhetorical hyperbole. Reddick v. Craig, 719 P.2d 340, 344-45 (Colo.Ct.App.1985) (use of word "rapist," read in context, was meant to express opinion that county taxpayers were not getting their money's worth); Karnell v. Campbell, 206 N.J.Super. 81, 501 A.2d 1029, 1034 (App.Div.1985) (reader of letter in which author claimed she was "raped" by a town's re-zoning decision would understand that she was not accusing the plaintiffs of the crime of rape).

The Plaintiffs argue that Harrison's Statement was not rhetorical hyperbole, but an opinion, and cite Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), for the proposition that opinion is not protected speech under the first amendment. In Masson, the Court held that whether Masson's statement, published in a magazine article, that he believed his supervisor thought of him as an "intellectual gigolo" was defamatory was a question of law. Id. at 522, 111 S.Ct. 2419. However, the Plaintiffs have misinterpreted the holding of Masson.

In Masson, the Court analyzed Masson's statement as if the magazine had reported that Masson's supervisor had stated that he thought Masson was an "intellectual gigolo." Although the term "intellectual gigolo" utilized colorful, descriptive language, the imputation of intellectual dishonesty, within the context of the case, was defamatory

in itself and therefore not mere rhetorical hyperbole. The essence of the statement was that Masson's supervisor believed Masson to be an "intellectual gigolo," i.e., "someone who forsakes intellectual integrity in exchange for pecuniary or other gain." Id. at 522, 111 S.Ct. 2419. There was a question of law as to whether Masson's statement was defamatory because the sentiments expressed in it were themselves defamatory, not because the statement constituted an opinion. The Court in Masson held that defamatory opinion is not protected speech and not that all opinion is unprotected speech.

This case is clearly distinguishable from Masson. The gist of Harrison's Statement was to express Harrison's negative opinion about the result in the Easement Action and to state that he felt his privacy was being violated; however, the substance of Harrison's Statement was not defamatory. Although Harrison's Statement reflected his opinion, it could not be construed as a statement that Harrison believed the Plaintiffs were, in fact, rapists, but was clearly rhetorical hyperbole expressing Harrison's feelings about the Easement Action. As Harrison's Statement was not a defamatory opinion about the Plaintiffs, Masson does not apply.

Accordingly, because Harrison's Statement was rhetorical hyperbole, it was protected by the first amendment and was not a false and defamatory statement concerning the Plaintiffs. The Plaintiffs' claims of

defamation against Harrison, The Advertiser, and Tanji all must fail. The Plaintiffs' claims of false light/invasion of privacy, punitive/exemplary damages, intentional infliction of emotional distress, and negligence were all derivative claims based on the Plaintiffs' claim that Harrison's Statement was defamatory, and, as Harrison's Statement was not defamatory, these claims must also fail. We affirm: (1) the final judgment; (2) the circuit court's orders granting The Advertiser and Tanji's motions for summary judgment; and (3) the Harrison Order, to the extent that it grants Harrison's motion for summary judgment. [FN7]

FN7. Because we affirm the orders granting Harrison, The Advertiser, and Tanji's motions for summary judgment on the basis that Harrison's Statement was rhetorical hyperbole, we need not reach the issues of: (1) whether the Plaintiffs were estopped from arguing that Harrison defamed them or placed them in a false light because their claim against Harrison was inconsistent with their claim against The Advertiser and Tanji; or (2) whether the Plaintiffs properly served Harrison in Great Britain pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, November 15, 1965, art. 1, 20 U.S.T. 361, 362, T.I.A.S. No. 6638, 658 U.N.T.S. 163, 165. An appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance. Poe v. Hawai'i Labor Relations Board, State of Hawai'i, 87 Hawai'i 191, 197, 953 P.2d 569, 575 (1998) (citing Enos, 79 Hawai'i at 459, 903 P.2d at

1280).

B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED HRCP RULE 11 SANCTIONS ON PICKETT.

The Plaintiffs next contend that the circuit court abused its discretion when, in the Harrison Order, it required Pickett to pay Harrison's attorneys' fees and costs in the amount of $12,504.48 as HRCP Rule 11 sanctions. We disagree.

At the outset, we examine whether we have jurisdiction to consider the appeal of the HRCP Rule 11 sanctions. "A well-settled rule is that 'only parties to a lawsuit may appeal an adverse judgment.' " Stewart Properties, Inc. v. Brennan, 8 Haw.App. 431, 433, 807 P.2d 606, 607 (1991) (quoting Marino v. Ortiz, 484 U.S. 301, 303, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam)) (ellipsis and brackets omitted). HRAP Rule 3(c) provides: "The notice of appeal shall specify the party or parties taking the appeal[.]" In Stewart Properties, the Intermediate Court of Appeals based its interpretation of HRAP Rule 3(c) on the United States Supreme Court's construction of Federal Rules of Appellate Procedure (FRAP) Rule 3(c) in Torres v. Oakland Scavenger Co., 487 U.S. 312, 314, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), and held that "the parties or parties taking the appeal must be specified in the notice of appeal." Stewart Properties, 8 Haw.App. at 435, 807 P.2d at 608 (emphasis in original).

Although Torres interpreted FRAP Rule 3(c), HRAP 3(c) was almost identical to FRAP Rule 3(c) before its amendment in 1993. [FN8] "In instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance." State v. Ontai, 84 Hawai'i 56, 61, 929 P.2d 69, 74 (1996) (quoting Price v. Obayashi, 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996)) (brackets omitted). [FN9]

FN8. HRAP Rule 3(c) provides:

The notice of appeal shall specify the party or parties taking the appeal and shall designate the judgment, order or part thereof appealed from. Forms 1, 2 and 3 in the Appendix of Forms are suggested forms of notices of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

FRAP Rule 3(c), prior to its amendment in 1993, provides: The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

FN9. "[FRAP] Rule 3(c) was amended effective December 1, 1993, however, to provide that an appeal should not be

dismissed 'for failure to name a party whose intent to appeal is otherwise clear from the notice.' The amendment effectively overrules Torres [, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) ] (see Garcia v. Wash, 20 F.3d 608, 609 (5th Cir.1994))[.]" Flaherty v. Gas Research Inst., 31 F.3d 451, 458 (7th Cir.1994). Inasmuch as HRAP Rule 3(c) has not been similarly amended, the interpretation of HRAP Rule 3(c) based on the construction of FRAP Rule 3(c) under Torres is still applicable.

Courts in other jurisdictions have held that when an attorney appeals Rule 11 sanctions, the attorney must be named as a party in the notice of appeal. "When an award of [Federal Rules of Civil Procedure (FRCP) Rule 11] sanctions runs only against the attorney, the attorney is the party in interest and must appeal in his or her own name." Mylett v. Jeane, 879 F.2d 1272, 1275 (5th Cir.1989) (citing Torres, 487 U.S. at 314, 108 S.Ct. 2405; DeLuca v. Long Island Lighting Co., 862 F.2d 427, 429 (2d Cir.1988)). "[I]n a [FRCP] Rule 11 sanctions appeal, 'the attorneys must appeal in their own names. A notice of appeal naming the party as the appellant, not the attorneys, does not create jurisdiction over the attorneys' appeal.'" Federal Trade Comm'n v. Amy Travel Service, Inc., 894 F.2d 879, 880 (7th Cir.1989) (quoting Rogers v. National Union Fire Ins. Co., 864 F.2d 557, 560 (7th Cir.1988)) (ellipsis omitted). See also American Respiratory Care Services v. Manager of Revenue, City and County of Denver, 835 P.2d 623, 626 (Colo.App.1992) (the client could not appeal

Colorado Rules of Civil Procedure Rule 11 sanctions imposed against the attorneys because the attorneys were the real parties in interest and were required to file a separate notice of appeal to preserve for review their challenge to the sanctions).

We agree with the analysis in Mylett, Amy Travel Service, and American Respiratory Care Services. Under HRCP Rule 11, when the attorney is sanctioned, the attorney must pay the HRCP Rule 11 sanctions. The sanctioning of the attorney is completely independent of the attorney's representation of the represented party, and the represented party's case is otherwise unaffected and unprejudiced. Therefore, as the only person affected by the HRCP Rule 11 sanctions, the attorney is the real party in interest and must challenge the imposition of HRCP Rule 11 sanctions as a named party on appeal.

Accordingly, we hold that, on appeal, in a case where an attorney has been sanctioned pursuant to HRCP Rule 11, the attorney must be named as a party in the notice of appeal in order for this court to have the jurisdiction to address the circuit court's imposition of HRCP Rule 11 sanctions against the attorney.

Here, the Plaintiffs were named as the parties to the appeal of the underlying circuit court action against Harrison in the notice of appeal, but it was the Plaintiffs' attorney, Pickett, who was required to pay Harrison's

attorneys' fees and costs in the amount of $12,504.48 as the HRCP Rule 11 sanctions. Pickett was named as the attorney in the notice of appeal, but was not named as a party. Consequently, as Pickett is not a party to this appeal, we lack appellate jurisdiction to address the circuit court's imposition of HRCP Rule 11 sanctions against Pickett.

Although we do not have appellate jurisdiction to decide the merits of the circuit court's imposition of HRCP Rule 11 sanctions against Pickett, we will discuss the circuit court's imposition of HRCP Rule 11 sanctions against Pickett in order to provide guidance to the circuit court because this appeal raises important issues concerning HRCP Rule 11 that have not been discussed previously by this court.

1. THE CIRCUIT COURT HAD THE AUTHORITY TO IMPOSE HRCP RULE 11 SANCTIONS AGAINST PICKETT.

HRCP Rule 11 provides in pertinent part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any

improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(Emphasis added); see also Lepere, 77 Hawai'i at 474, 887 P.2d at 1032.

The Harrison Order stated that Pickett was sanctioned pursuant to HRCP Rule 11 because "the claim against Defendant Harrison was not well grounded in fact or warranted by either existing law or a good faith argument for the extension, modification[,] or reversal of existing law." The Harrison Order did not identify the pleading, motion, or other paper that Pickett signed to invoke HRCP Rule 11 sanctions. The language of the Harrison Order stated that the basis for HRCP Rule 11 sanctions was "the claim against Defendant Harrison." This language indicates that the sanctions were based on the amended complaint filed on July 21, 1995, which alleged claims of defamation, false light/invasion of privacy, and intentional infliction of emotional distress against Harrison.

Although Pickett's name appeared in the complaint as an attorney for the Plaintiffs, Pickett did not sign the complaint. Generally, an attorney must sign a pleading, motion, or other paper to be held liable for a HRCP Rule 11 violation. Enos, 79 Hawai'i at 457, 903 P.2d at 1278. However, although Pickett did not sign the complaint, Pickett is responsible for the claim against Harrison in the

complaint because: (1) Pickett's name was listed in the complaint as an attorney for the Plaintiffs; and (2) his actions later ratified or indicated that he adopted the signature of the attorney who did sign the complaint.

[W]here counsel whose name appears on a pleading fails to sign a pleading, but later comes into court and ratifies and adopts the signature of co-counsel as his own, the requirements of Rule 11 of the Federal Rules of Civil Procedure have been found to have been satisfied.

Blossom v. Blackhawk Datsun, Inc., 120 F.R.D. 91, 101 (S.D.Ind.1988) (citing Pavlak v. Duffy, 48 F.R.D. 396, 398 (D.Conn.1969)). Although Blossom interpreted FRCP Rule 11, HRCP Rule 11 was modeled after FRCP Rule 11 before its amendment in 1993. Lepere, 77 Hawai'i at 473-74, 887 P.2d at 1031-32. "Where we have patterned a rule of procedure after an equivalent rule within the FRCP, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court." Kawamata Farms v. United Agri Products, 86 Hawai'i 214, 255, 948 P.2d 1055, 1096 (1997) (citation and quotation marks omitted). [FN10]

FN10. In 1993, FRCP Rule 11 was amended and is now substantively different from HRCP Rule 11.

In an affidavit to the circuit court, filed in support of his ex parte motion for an evidentiary hearing, Pickett

declared that "[a]ll actions with respect to the filing and prosecution of this case ... were taken by me and my firm, as lead counsel for Plaintiffs[.]" Consequently, inasmuch as Pickett asserted that everything in the case was done with his full knowledge and approval, he ratified and adopted the complaint filed by the Plaintiffs as his own, waiving the argument that he never actually signed the complaint within the meaning of HRCP Rule 11. The circuit court, therefore, had the authority to impose HRCP Rule 11 sanctions against Pickett.

2. THE PLAINTIFFS' CLAIM WAS NOT WARRANTED BY EXISTING LAW.

We now examine whether the circuit court abused its discretion in imposing HRCP Rule 11 sanctions against Pickett. In support of its holding in the Harrison Order that "the claim against Defendant Harrison was not well grounded in fact or warranted by either existing law or a good faith argument for the extension, modification[,] or reversal of existing law[,]" the circuit court cited the following facts:

(1) the Plaintiffs' failure to explain why Defendant Harrison's statements were not constitutionally protected hyperbole, (2) the Plaintiffs' dismissal of their prior federal action against Harrison[,] and (3) [ ] the [circuit] court's ruling in favor of Defendants [The Advertiser] and Tanji and by Plaintiffs' prior inconsistent arguments concerning

the intended target of the statements attributed to Defendant Harrison.

One of the bases for the circuit court's granting of HRCP Rule 11 sanctions against Pickett was that the claim against Harrison was not warranted by existing law. The circuit court held that because the Plaintiffs failed to explain why Harrison's Statement was not rhetorical hyperbole and not constitutionally protected, the Plaintiffs' claim was frivolous under HRCP Rule 11. We agree.

Pickett, in the memorandum in opposition to Harrison's motion for summary judgment, argued that Harrison's Statement was not constitutionally protected rhetorical hyperbole, but was his opinion of the Plaintiffs. As noted in Part III.A., supra, defamatory opinion is not constitutionally protected speech; however, Harrison's Statement was not a defamatory opinion, but was clearly rhetorical hyperbole. In the memorandum in opposition to Harrison's motion for summary judgment, Pickett made no attempt to distinguish this case from Bresler, Letter Carriers, Falwell, or Milkovich, United States Supreme Court cases that established constitutional protection for rhetorical hyperbole.

Accordingly, the circuit court's determination that the Plaintiffs' claim of defamation against Harrison was frivolous was not an abuse of discretion, and the circuit court properly imposed HRCP Rule 11 sanctions against

Pickett, the Plaintiffs' attorney. [FN11]

FN11. Because we would have affirmed the circuit court's imposition of HRCP Rule 11 sanctions against Pickett because the Plaintiffs' defamation claim against Harrison was not warranted by existing law, we need not reach the issues of whether HRCP Rule 11 sanctions were warranted because: (1) the Plaintiffs voluntarily dismissed the Federal Action against Harrison without prejudice; and (2) the Plaintiffs made inconsistent arguments concerning the intended target of Harrison's Statement.

3. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION AND DID NOT DENY PICKETT DUE PROCESS BY FAILING TO HOLD AN EVIDENTIARY HEARING ON THE HRCP RULE 11 SANCTIONS.

Finally, we examine whether the circuit court abused its discretion and denied Pickett due process by failing to hold an evidentiary hearing on the HRCP Rule 11 sanctions.

Harrison's motion for HRCP Rule 11 sanctions was included with his motion for summary judgment, and the hearing for these motions was held on September 11, 1996. Pickett chose not to attend the hearing. The transcripts for this hearing were not included as a part of the record on appeal.

In any event, regardless of what happened at the hearing, Pickett received due process. Due process requires notice and a hearing, and Pickett received both. Harrison's motion for HRCP Rule 11 sanctions was served on Pickett on June 27, 1996, affording Pickett over two months to prepare for the HRCP Rule 11 hearing. Pickett addressed and opposed the motion for HRCP Rule 11 sanctions in the memorandum in opposition to Harrison's motion for HRCP Rule 11 sanctions. In addition, it was Pickett's choice not to attend the hearing.

Pickett did request an evidentiary hearing in an ex parte motion to the circuit court following the granting of HRCP Rule 11 sanctions at the September 11, 1996 hearing; however, in the ex parte motion, Pickett did not explain what evidence he planned to introduce or otherwise indicate why an evidentiary hearing was necessary. [FN12]

FN12. Pickett did state that he contested the imposition of HRCP Rule 11 sanctions against him and the amount of the HRCP Rule 11 sanctions, but Pickett could have raised and addressed these issues at the September 11, 1996 hearing, had he chosen to attend the hearing.

Accordingly, the circuit court did not abuse its discretion and did not deny Pickett due process by failing to hold an evidentiary hearing on the HRCP Rule 11 sanctions.

C. THE PLAINTIFFS' APPEAL WAS FRIVOLOUS AND

WARRANTED SANCTIONS PURSUANT TO HRAP RULE 38.

In his answering brief, Harrison argues that the Plaintiffs' appeal of this case was frivolous and moves for attorneys' fees and costs for this appeal pursuant to HRAP Rule 38. [FN13] We agree and hold that Harrison is entitled to HRAP Rule 38 relief.

FN13. Harrison also moved for attorneys' fees and costs on appeal pursuant to HRCP Rule 11. However, HRCP Rule 11 does not apply to attorneys' fees and costs on appeal. HRCP Rule 1 provides that the Hawai'i Rules of Civil Procedure govern civil procedure in the circuit court. HRAP Rule 1(a) provides that the Hawai'i Rules of Appellate Procedure govern procedure in appeals to the Hawai'i Supreme Court from the circuit court. Consequently, HRAP Rule 38, and not HRCP Rule 11, governs frivolous appeals.

HRAP Rule 38 states that "[i]f a Hawai'i appellate court shall determine that an appeal decided by it was frivolous, it may award damages including reasonable attorneys' fees and costs to the appellee." In Abastillas v. Kekona, 87 Hawai'i 446, 958 P.2d 1136 (1998), we noted that where the circuit court ruled that a lawsuit was frivolous, it follows logically that the subsequent appeal was also frivolous. See Mestayer v. Wisconsin Physicians Serv. Ins. Corp., 905 F.2d 1077, 1081 (7th Cir.1990) ("An appeal

may be frivolous when it merely restates arguments that the [trial] court properly rejected ... [or that] were so groundless as to be held sanctionable by the [trial] court.") Abastillas, at 449, 958 P.2d at 1139 (brackets and ellipsis in original).

Examining the record, Harrison correctly argues that the Plaintiffs' claim of defamation against Harrison was meritless--Harrison's Statement was clearly rhetorical hyperbole protected by the first amendment. Similarly, the HRCP Rule 11
sanctions imposed against Pickett were warranted because the Plaintiffs' claim of defamation was not warranted by existing law and the Plaintiffs made no good faith argument for the extension or modification of the law.

On appeal, the Plaintiffs continued to argue that Harrison's Statement was his opinion of the Plaintiffs and that HRCP Rule 11 sanctions were not warranted, but do not point to any evidence or case law that was not already cited in their memorandum submitted in opposition to Harrison's motion for summary judgment and HRCP Rule 11 sanctions. This was not only a situation of the Plaintiffs failing to prevail on meritless claims, but also a matter of the Plaintiffs refusing to acknowledge controlling authority brought to their attention on numerous occasions. The Plaintiffs continued to make the same argument that Harrison's Statement was opinion and that HRCP Rule 11 sanctions were unwarranted, despite the fact that Harrison's Statement was clearly rhetorical hyperbole. The Plaintiffs

completely ignored the Bresler--Letter Carriers--Falwell line of cases, which discussed rhetorical hyperbole, failing even to address these cases in their opening brief. Based on the facts of this case, the Plaintiffs' appeal was frivolous and warrants sanctions in the form of attorneys' fees and costs pursuant to HRAP Rule 38.

Accordingly, we hold that the Plaintiffs' appeal was frivolous and grant Harrison's request for attorneys' fees on the appeal pursuant to HRAP Rule 38.

## IV. CONCLUSION

For the foregoing reasons, we affirm: (1) the final judgment, filed January 10, 1997; (2) the order granting The Advertiser and Tanji's motion for summary judgment, filed October 17, 1995; and (3) the Harrison Order, filed November 14, 1996. We also grant Harrison's request for attorneys' fees and costs on appeal pursuant to HRAP Rule 38.

In the Circuit Court of the Second Circuit
State of Hawai'i

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| Steven Philip Gold, and Scott Howard Whitney, | ) | |
| Plaintiffs, | ) | |
| *vs.* | ) | Civil No. 95-0554(2) |
| | ) | (Assault, libel & |
| George Harrison, Gannett Pacific Corporation d/b/a The Honolulu Advertiser, and Edwin Tanji, | ) | slander) |
| Defendants. | ) | |

**ORDER GRANTING DEFENDANT GEORGE HARRISON'S MOTION (1) TO DISMISS WITH PREJUDICE PLAINTIFFS' FIRST AMENDED COMPLAINT FILED JULY 21, 1995 AND (2) FOR RULE 11 SANCTIONS AND/OR ATTORNEY FEES FILED JULY 1, 1996**

Defendant George Harrison's Motion (1) to Dismiss with Prejudice Plaintiffs' First Amended Complaint Filed July 21, 1995 and (2) for Rule 11 Sanctions and/or Attorneys' Fees Filed July 1, 1996 were heard by the Court on September 11, 1996, before the Honorable Shackley F.

Raffetto. Paul Alston, Esq. appeared on behalf of Defendant Harrison. Amy Wasson, Esq. appeared on behalf of Plaintiffs Gold and Whitney.

After considering the parties' written submissions, taking judicial notice of the documents filed in *Gold v. Harrison*, Civ. No. 93-00627 SPK (D. Haw. filed Aug. 11, 1993), the record of this action, and the arguments of counsel, it is hereby

ORDERED that this case shall be, and hereby is, DISMISSED WITH PREJUDICE for three independent reasons. First, the allegedly defamatory statements attributed to Defendant Harrison are non-defamatory constitutionally protected rhetorical hyperbole; there is no good faith allegation or contention that the allegation of "rape" was anything more than colorful non-factual figurative speech, regardless of the identity of the persons at whom the remarks were targeted. Second, the Plaintiffs previously sought to validate their claim in this case against Defendants Gannett Pacific Corporation and Edwin Tanji on the basis that they distorted Defendant Harrison's statements to make it appear, falsely, that Defendant Harrison was disparaging the Plaintiffs when, in fact, he was disparaging overly zealous members of the news media. Having sought to hold Gannett Corporation and Tanji liable on that factual premise—which is inconsistent with imposing liability on Defendant Harrison—Plaintiffs are now estopped, under *Rose v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 664 P.2d 745 (1983) from arguing that Defendant Harrison defamed them or placed them in a false

light. Third, pursuant to this court's February 20, 1996 Order Withdrawing Notice of Dismissal, Plaintiffs were required to make proper service on Defendant Harrison on or before May 17, 1996. Plaintiffs have failed to prove that service was made within that deadline in a manner consistent with the requirements of the Hague Service Convention.

IT IS FURTHER ORDERED that sanctions in the amount of $12,504.48 shall be, and hereby are, assessed against Will H. Pickett, counsel *pro hac vice* for Plaintiffs, pursuant to Rule 11, Haw.R.Civ.Proc. For the reasons set forth above the claim against Defendant Harrison was not well grounded in fact or warranted by either existing law or good faith argument for the extension, modification or reversal of existing law. Indeed, Plaintiffs did not urge any change in the law; instead, they sought to ignore controlling precedent and misapply prevailing constitutional doctrine. It should not have been necessary for Defendant Harrison to bring this motion or otherwise defend himself in this action. Plaintiffs have offered no plausible argument for imposing liability on Defendant Harrison under existing law or under any new legal theory which has any chance of success. This conclusion is reinforced by (1) the Plaintiffs' failure to explain why Defendant Harrison's statements were not constitutionally protected hyperbole, (2) the Plaintiffs' dismissal of their prior federal action against Harrison, and (3) by the court's ruling in favor of Defendants Gannett Pacific Corporation and Tanji and by Plaintiffs prior inconsistent arguments concerning the

intended target of the statements attributed to Defendant Harrison. These sanctions shall be paid to counsel for Defendant Harrison by cashiers' check within 15 days after the entry of this order. Therefore, sanctions equal to the fees and costs incurred by Defendant Harrison are appropriate.

DATED: Wailuku, Maui, Hawai'i, November 14, 1996.

/s/ Shackley F. Raffetto

Judge of the above-entitled Court

In the Circuit Court of the Second Circuit
State of Hawai'i

| | | |
|---|---|---|
| Steven Philip Gold, and Scott Howard Whitney, | ) | |
| Plaintiffs, | ) | |
| *vs.* | ) | Civil No. 95-0554(2) |
| | ) | (Assault, libel & |
| George Harrison, Gannett Pacific Corporation d/b/a The Honolulu Advertiser, and Edwin Tanji, | ) | slander) |
| Defendants. | ) | |

**ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT GANNET PACIFIC CORPORATION dba THE HONOLULU ADVERTISER, AND EDWIN TANJI AS TO ANY AND ALL CLAIMS ASSERT BY PLAINTIFFS AGAINST THEM IN PLAINTIFFS' FIRST AMENDED COMPLAINT FILED ON JULY 21, 1995**

Defendant Gannett Pacific Corporation, d/b/a *The Honolulu Advertiser*, and Edwin Tanji's Motion to Dismiss With Prejudice Any And All Claims Asserted by Plaintiffs Against Them In Plaintiffs' First Amended Complaint

Filed On July 21, 1995 came on for hearing on September 29, 1995, at 8:30 a.m., before the Honorable Shackley f. Raffetto.

Although Defendants' motion was presented to the Court as a motion to dismiss under Rule 12(b)(6), Haw. R. Civ. P., because matters outside the pleading were presented to and considered by the Court in the determination of this motion, namely, the full text of the news article in question, the Court shall treat the subject motion as one for summary judgment under Rule 56, Haw. R. Civ. P.

This action arose out of a published quote from entertainer George Harrison in *The Honolulu Advertiser* on July 21, 1993. In discussing testimony he had given that day in easement litigation in which the libel plaintiffs were his opponents, Harrison said, "Have you ever been raped? I'm being raped by all these people." Plaintiffs claim they were defamed by this quote. The question of defamatory construction is one for the Court, to be decided as a matter of law. *Fernandes v. Tenbruggencate*, 65 Haw. 226, 228, 649 P.2d 1144, 1147 (1982); *Beamer v. Nishiki*, 66 Haw. 572, 670 P.2d 1264 (1983).

After considering the briefs in support of and in opposition to the motion, and hearing the argument of counsel, this Court finds as a matter of law that the words in question are rhetorical hyperbole and that, as such, they are not legally actionable with regard to Plaintiffs' claims for defamation and false light invasion of privacy. *Greenbelt Pub. C. v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26

L. Ed.2d 6 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed.2d 745 (1974); *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995) (applying Hawai'i law).

Additionally, Plaintiffs allege a claim for intentional infliction of emotional distress, which is derivative of their claims for defamation and false light invasion of privacy. This claim too must fall, since the statement sued upon is protected by the First Amendment, regardless of the form of the tort alleged. *Partington*, 56 F.3d at 1159 (citing *Moldea v. New York Times*, 22 F.3d at 319 (D.C. Cir. 1994)); *Basilius v. Honolulu Pub. Co.*, 711 F. Supp. 548, 552 (D. Haw. 1989).

**IT IS HEREBY ORDERED** that Defendants' motion is granted in accordance with the provisions of Rule 56, Haw. R. Civ. P., and that summary judgment is hereby entered in favor of Defendants Gannett Pacific Corporation, d/b/a *The Honolulu Advertiser*, and Edwin Tanji as to all claims asserted against them by Plaintiffs in the First Amended Complaint filed on July 21, 1995.

DATED: Wailuku, Hawai'i, October 16, 1995.

/s/ Shackley F. Raffetto (seal)

Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ William H. Pickett

William H. Pickett

Amy M. Wasson

No. 20468

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

| | | |
|---|---|---|
| Steven Philip Gold, and Scott Howard Whitney, | ) | |
| Plaintiffs-, Appellants, | ) | |
| *vs.* | ) | Civil No. 95-0554(2) |
| George Harrison, Gannett Pacific Corporation d/b/a The Honolulu Advertiser, and Edwin Tanji, | ) | |
| Defendants- Appellees. | ) | |

**ORDER PARTIALLY GRANTING MOTION FOR RECONSIDERATION**

Upon consideration of the motion for attorney's fees and costs submitted by PETER W. OLSON, ESQ., the attorney for defendants-appellees Gannett Pacific Corporation, d/b/a *The Honolulu Advertiser* and Edwin Tanji (collectively, Gannett), it appears that: (1) the motion for reconsideration was made pursuant to Hawai'i Rules of

Appellate Procedure (HRAP) Rule 40; (2) attorney's fees and costs were requested pursuant to HRAP Rule 38; (3) HRAP Rule 38 states that "[i]f a Hawai'i appellate court shall determine that an appeal decided by it was frivolous, it may award damages including reasonable attorneys' fees and costs to the appellee;" (4) this court in *Gold v. Harrison*, No. 20468, held that plaintiffs-appellants Steven Gold and Scott Whitney's appeal was frivolous and granted defendant-appellant George Harrison's motion for attorney's fees and costs pursuant to HRAP Rule 38; (5) the appeal was also frivolous as to Gannett and Gannett was entitled to attorney's fees and costs pursuant to HRAP Rule 38; (5) [sic] the motion for reconsideration requested compensation for 38.75 hours of work for a total of $8,125.79 in attorney's fees and $335.62 in costs; (6) the motion for reconsideration itemized the costs but failed to substantiate the costs; (7) this court is unable to determine whether the costs incurred by Gannett were reasonable; (8) the motion for reconsideration itemized the attorney's fees but failed to substantiate some of the attorney's fees; (9) the follow attorney's fees were substantiated: (a) 8.25 hours to Jeffrey S. Portnoy; (b) 6.5 hours to Peter W. Olson; and (c) 2.5 hours to Patrick Hanifin; and (10) attorney's fees and costs incurred in drafting a motion for attorney's fees and costs are not reasonable attorney's fees and costs related to the appeal. Therefore,

IT IS HEREBY ORDERED that Gannett's request for costs is denied and attorney's fees in the amount of $3,386.25 are approved.

DATED: Honolulu, Hawai'i, August 20, 1998.

FOR THE COURT:

/s/ Paula A. Nakayama
Associate Justice